

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES DONALD BENOIT,

Defendant-Appellant.

UNPUBLISHED

October 3, 2006

No. 261292

Washtenaw Circuit Court

LC No. 04-000065-FH

Before: Sawyer, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of two counts of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(g) (incest). Defendant was sentenced to serve 30 days in jail. On appeal, defendant contends the court provided erroneous jury instructions and erred in denying his request to reopen closing statements. Defendant also challenges the constitutionality of MCL 750.520e and MCL 750.520a(n). We affirm.

Defendant first contends that the court erred in instructing the jury that it should use the reasonable person standard when determining whether actions could be reasonably construed as being for the purpose of sexual gratification. We disagree. Although defendant objected to the court's instruction at trial, defendant's objections at trial differ from his argument on appeal. Therefore, defendant did not properly preserve the issue for appeal. MCR 2.516(C). Unpreserved issues are reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). A party claiming plain error must demonstrate that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant. *Id.* at 763.

In *People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998), this Court set forth the general principles this Court should follow when reviewing whether there was error in the jury instructions:

This Court reviews jury instructions as a whole to determine whether there is error requiring reversal. The instructions must include all the elements of the charged offense and must not omit material issues, defenses, and theories if the evidence supports them. Even if somewhat imperfect, instructions do not create

error if they fairly present to the jury the issues tried and sufficiently protect the defendant's rights. [Citations omitted.]

First, with regard to the court's response to the jury's first question, defendant contends the court should have defined the term "reasonable person standard" because it is a term of art. However, in *People v Piper*, 223 Mich App 642; 567 NW2d 483 (1997), this Court addressed a similar situation. In *Piper*, the defendant was charged with CSC II. *Id.* at 643. During deliberations, the jury asked the trial court, ". . . Specifically provide more explanation for the mean[ing] of the term 'construed' and the phrase 'construed for sexual purposes' and by whom." *Id.* at 649. The defendant requested that the court instruct the jury that it had to find that the defendant intended the contact for sexual gratification. *Id.* However, the court responded, in relevant part, ". . . Thus, 'construed' as used in my instruction to you means that you must find that the action or actions in question can reasonably be interpreted to have been for the purpose of sexual gratification under the circumstances as you find them to be." *Id.* at 650. On appeal, the defendant contended that the trial court confused the jury and that the court's instruction would allow the jury to find sexual contact occurred if the jury adopted any person's perspective regarding the sexual contact. *Id.* at 648. This Court noted that CSC is a general intent crime, and therefore the trial court was not permitted to instruct the jury to consider defendant's mens rea as defendant had requested. *Id.* at 646, 650. Therefore, this Court concluded that the instructions were sufficient to protect the defendant's rights and fairly present the issues to be tried and affirmed the defendant's convictions. *Id.* at 650.

Therefore, the only difference between the court's instructions in this case and the court's instructions in *Piper*, was that the trial court in this case instructed the jury to use a reasonable person standard. However, there is no indication that the jurors were confused by the court's insertion of the phrase "reasonable person standard." The jury simply asked the same question two different times—once before the court inserted the phrase "reasonable person standard," and once after. Moreover, the jury quoted the relevant portion of CJI2d 20.13 when asking both of its questions, indicating that the jury was confused by CJI2d 20.13 as opposed to the court's additional instruction. Importantly, the jury never asked the court to define or expand upon "the reasonable person standard," and did not use the term in its subsequent questions to the court. Moreover, as noted above, this trial court's response to the jury was nearly identical to the court's response in *Piper*, and this Court found that the response in *Piper*, when viewed with the other instructions, "sufficiently protected defendant's rights and fairly presented the issues to be tried." *Piper, supra* at 650. Accordingly, the court's instruction in this case was not erroneous.

Defendant next contends on appeal that the court erred in not explicitly instructing the jury to not use the complainant's point of view when determining whether it can be reasonably construed that defendant acted with a sexual purpose. Defendant did not make this specific objection at trial, and therefore the issue was not preserved. MCR 2.516(C). Accordingly, this

Court will review the unpreserved claim of instructional error for plain error affecting substantial rights. *Carines, supra* at 763, 774.¹

In this case, for the reasons stated above, pursuant to *Piper, supra*, the trial court's response to the jury's questions sufficiently protected defendant's rights and fairly presented the issues to be tried. Moreover, the trial court repeatedly instructed the jury that it was the finder of fact, it could exclude or consider all or part of a witness's testimony, and it was solely responsible for determining whether it believed the witness was telling the truth or whether the witness's account of the events in question was accurate. The court also provided the jury with a number of instructions on how to assess the witness's testimony and consider how the witness's version of events was consistent or inconsistent with the other evidence presented. Accordingly, we find that the instruction adequately protected defendant's rights where the court informed the jury it was to decide the facts in an objective manner.

Defendant next contends on appeal that the court's use of the phrase "totality of the circumstances" in its second response to the jury effectively instructed the jury to use the victim's point of view. However, defendant objected to the court's initial use of the phrase "under the circumstances as you find them to be," and requested that the court use the phrase "totality of the facts." Accordingly, when the jury asked the second question, the court responded to the jury with defendant's requested language. "[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence" *People v Griffin*, 235 Mich App 27, 45-46; 597 NW2d 176 (1999). Accordingly, where the court gave the objected to instruction at defendant's request, defendant cannot now claim on appeal that the instruction was erroneous.

Defendant next contends that the court erred in denying his request to reopen closing arguments. However, defendant does not set forth any citation for the proposition that the court should have reopened closing arguments. A party "may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Regardless, " 'a trial [court] has wide discretion and power in matters of trial conduct,' including limiting closing argument." *Barnett v Hidalgo*, 268 Mich App 157, 170; 706 NW2d 869 (2005), quoting *Lansing v Hartsuff*, 213 Mich App 338, 349; 539 NW2d 781 (1995), and a court reviews a claim alleging a failure to exercise discretion for an abuse of discretion. *Rieth v Keeler*, 230 Mich App 346, 348; 583 NW2d 552 (1998). For the reasons stated above, the jury's confusion did not result from the court's insertion of the phrase "reasonable person standard" into the jury instructions, and therefore reopening closing arguments to discuss this concept would have been unnecessary. Accordingly, the trial court did not abuse its discretion in denying defendant's request to reopen closing arguments.

¹ Defendant claims that this question involves structural constitutional error. However, because this argument claims an instructional error involving misdescription of only one element of a crime it is subject to harmless error analysis. *People v Duncan*, 462 Mich 47, 54; 610 NW2d 551 (2000). Structural error is not subject to harmless error analysis. *Id.* at 51-52. Thus, this question cannot involve structural error.

Finally, defendant contends MCL 750.520e and MCL 750.520a(n) are unconstitutional because they require that the jury find proof less than beyond a reasonable doubt that defendant intended the touchings to be for a sexual purpose. We disagree. Questions of statutory construction are reviewed de novo. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 62; 642 NW2d 663 (2002).

MCL 750.520e provides, in relevant part:

(1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist:

* * *

(d) That other person is related to the actor by blood or affinity to the third degree and the sexual contact occurs under circumstances not otherwise prohibited by this chapter.

Sexual contact, as used in the statute, is defined as:

“Sexual contact” includes the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:

- (i) Revenge.
- (ii) To inflict humiliation.
- (iii) Out of anger. [MCL 750.520a(n).]

In *Piper, supra*, this Court responded to a similar issue. In *Piper*, the defendant contended that the statute was void for vagueness because the “statutory language allow[ed] a juror to conclude that the charged conduct was for a sexual purpose from any person’s perspective, including the complainant’s, and that that statute’s inherent vagueness permit[ed] a jury unstructured and unlimited discretion to determine whether the accused committed the offense.” *Piper, supra* at 645-646. This Court responded by noting at the outset that “criminal sexual conduct is a general intent crime; a defendant’s *specific* intent is not at issue.” *Id.* at 646 (emphasis in original). This Court also noted that the Legislature had rejected a proposed version of the predecessor of MCL 750.520e that would have required proof that the defendant specifically acted with the purpose of deriving sexual gratification. *Id.* Specifically addressing defendant’s contentions on appeal, this Court in *Piper* stated:

The statute’s language is clear and its inclusion of a reasonable person standard provides a structure to guide the jury’s determination of the purpose of

the contact. Consequently, contrary to defendant's argument, a jury is properly limited to a determination whether the defined conduct, when viewed objectively, could reasonably be construed as being for a sexual purpose. Accordingly, we hold that the statute is not unconstitutionally vague. [*Piper, supra* at 647 (internal citations omitted).]

In applying the rationale in *Piper* to this case, defendant's contention that MCL 750.520e requires that the jury examine the subjective intent of the defendant is incorrect because the relevant inquiry is not the defendant's subjective intent, but whether the conduct could reasonably be viewed as being for a sexual purpose. Thus, we reject defendant's constitutional challenge to MCL 750.520e and MCL 750.520a(n) because it is based on a false premise.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell